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IN THE

Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICUS CURIAE THE CALIFORNIA AGRICULTURAL ISSUES FORUM SUPPORTING PETITIONERS

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
TODD ZUBLER
BRIAN M. BOYNTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

QUESTION PRESENTED

Whether the Eighth Circuit erred in holding that the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901 *et seq.*, and regulations promulgated thereunder are unconstitutional.

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STATEMENT OF INTEREST[1]

The California Agricultural Issues Forum ("the Forum") is a nonprofit mutual benefit corporation whose members are entities established under state or federal laws to collect mandatory assessments and to use those assessments to engage in research and promotional activities relating to particular agricultural commodities. The Forum is thus intimately familiar with the workings of programs like that at issue in this case and has a substantial interest in the continued operation and success of those programs.

SUMMARY OF ARGUMENT

Few issues of public policy have plagued national and state government as profoundly or as consistently as low farm prices.[2] Since at least the 1930s, Congress and the States have attempted innumerable remedies, from production restrictions, to antitrust exemptions, to price supports. Fields that were already planted have been "plowed up" and millions of newborn pigs and hundreds of thousands of sows killed to drive up prices; taxpayers have shouldered the cost of hundreds of billions of dollars of farm subsidies; and the Government has taken the extraordinary step of paying farmers not to farm.

As discussed more fully below, the problem of low farm prices has persisted in part because most agricultural commodities, unlike many other goods, come from a very large number of relatively small producers and are undifferentiated between producers. In 2002, for example, there were more than two million farms in the United States, each with

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[1] The parties in this case have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Forum, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g.*, Jon Lauck, *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom To Farm,"* 5 Drake J. Agric. L. 3, 15 (2000) (In the 1960 presidential election, Senator John Kennedy declared that low farm prices were "our no. 1 . . . domestic problem.").

average sales of less than $100,000.[3] As a result—unlike the IBMs or GMs of the world—the average avocado, cherry, or grape farmer cannot possibly engage in the costly research and promotion necessary to increase overall consumer demand (and thus price) for his or her product. Experience and economic theory show, moreover, that *voluntary* efforts to band together to do so are destined to fail. The average avocado farmer, for example, has no incentive to advertise individually, or to join with other farmers to do so, when the benefit of his or her expenditure or contribution will be shared over the thousands of other growers—many of whom may have themselves opted not to contribute.

Mandatory agricultural research and promotion programs, like that at issue in this case, represent a singular success in addressing this "collective action problem" and the plight of small farms throughout the country. There are more than one hundred existing federal and state mandatory commodity research and promotion programs, which undertake, among other things, health and agriculture research, foreign market access initiatives, consumer education, and generic advertising—all designed to increase demand or to improve production for particular agricultural commodities. And they have had extraordinary success in doing so. Indeed, in some cases, the return on investment to each participant is as high as $26 for every dollar paid. No other farm policy has come close to achieving this level of success.

The Eighth Circuit's decision jeopardizes these programs and the countless farm-related jobs that depend on the market demand they generate. Perhaps most disturbingly, the approach adopted by the Eighth Circuit would impose on Congress (and, presumably, state legislatures) a single, judicially defined recipe for agricultural promotion: If Congress wants to expand demand for an agricultural commodity by imposing mandatory assessments on growers that

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[3] *See 2002 Census of Agriculture*, vol. 1, ch. 1, tbl. 1, *available at* http://www.nass.usda.gov/census/census02/volume1/us/st99_1_002_002.pdf (last visited Aug. 20, 2004).

are then used for advertising (along with other demand-increasing activities), it must first implement a "broader collective enterprise" in which growers' "freedom to act independently" is "constrained by [a] regulatory scheme," as in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). *See United States* v. *United Foods*, 533 U.S. 405, 412 (2001) (quoting *Wileman*, 521 U.S. at 469). Under the reasoning of the Court of Appeals, any other program of this sort is *per se* unconstitutional. Nothing in the First Amendment or this Court's precedents compels this remarkable conclusion.

First, contrary to the Court of Appeals' conclusion, the First Amendment does not even apply to the mandatory funding of speech by a government-established entity that delivers a message defined by the government.

Second, even if the First Amendment applies, it does not impose any such *per se* rule. Rather, because mandatory commodity promotion programs bar no speech, but simply provide additional information to consumers; do not compel any speech, but only the payment of money; and do not convey an ideological message, but only commercial advertisements, the most stringent level of scrutiny that can possibly apply is intermediate scrutiny. Given the opportunity, the vast majority of federal and state commodity research and promotion programs will be able to show that they effectively further an important government interest in supporting agricultural industries and helping to overcome the collective action problem, and that they do so in a narrowly tailored manner.

Finally, many mandatory commodity programs are also constitutional under the "germaneness" test articulated in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), because unlike the stand-alone advertising program at issue in *United Foods*, they use advertising as part of a broader effort to expand demand—including through health and agricultural research and foreign market access efforts.

Regardless of how any particular program might fare if subjected to the proper constitutional scrutiny, the Court of

Appeals plainly erred in setting aside an important federal statute solely because it concluded that the program was not accompanied by a collectivization of the industry.

ARGUMENT

I. MANDATORY CONTRIBUTIONS FOR COMMODITY PROMOTION PROGRAMS DO NOT IMPLICATE PRODUCERS' FIRST AMENDMENT RIGHTS BECAUSE THE SPEECH FUNDED IS THAT OF THE GOVERNMENT.

A. The Eighth Circuit's determination that the government-speech doctrine does not apply in a case involving compelled funding of speech (*see* Pet. App. 17a-18a) should be rejected. This Court has recognized that it is "inevitable that funds raised by the government will be spent for speech and other expression" and that the government may pay for that speech with "taxes or other exactions binding on protesting parties." *Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000). Thus, the Court has made clear that citizens compelled to fund government speech have no right under the First Amendment to object to funding that speech. *See Keller* v. *State Bar of Cal.*, 496 U.S. 1, 12-13 (1990).[4] The advertising of most commodity promotion programs is government speech because the boards that run the ads are instrumentalities of the government under this Court's precedent and the messages they deliver are defined by Congress and the state legislatures.

This Court's decision in *Lebron* v. *National Railroad Passenger Corp.* makes clear that where "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent

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[4] The Court of Appeals relied on *Southworth* in holding that the government-speech doctrine does not apply to a case involving the mandatory funding of speech. *See* Pet. App. 17a-18a. But *Southworth* compels exactly the opposite conclusion. *Southworth*, too, involved the mandatory funding of speech, and although the government-speech doctrine did not apply there, the Court said it did not only because "[t]he University ha[d] disclaimed that the speech is its own." 529 U.S. at 229.

authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." 513 U.S. 374, 400 (1995). Here, the Court of Appeals concluded that *Lebron* was inapplicable because Amtrak, which was resisting a holding that its billboards were public fora, "argued that it was *not* part of the government," whereas "in a government speech case the defendant typically argues that it *is* part of the government and therefore immune from content-related First Amendment scrutiny." Pet. App. 18a n.5. The court did not explain, however, why this difference matters, unless the governing rule is that an entity's governmental status must always be resolved against the entity in favor of a First Amendment challenge. But that cannot be the law. To the contrary, if an entity is a part of the government that cannot make content-based distinctions when it creates a public forum for private speech, then surely that same entity remains part of the government when it is itself the speaker.[5]

In the present context, moreover, not only is the speaker a government-created entity, with government-appointed members, but the message that it conveys is also defined by the government. The Beef Act, for example, like most commodity promotion programs, defines the speech at issue: it must be about beef—speech about politics, social issues, and anything else is not authorized—and it must convey a specific message about beef, namely, that consumers should buy more beef. *See* 7 U.S.C. §§ 2902(13), 2904(10). A commodity promotion board's speech, in other words, is fundamentally different from the political and ideological speech of the State Bar in *Keller*, which was not specified by the government and which this Court held lawyers could not be compelled to subsidize. *See* 496 U.S. at 13-16. For these

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[5] The fact that members of the Beef Board are nominated by state cattle associations before being appointed by the Secretary of Agriculture does not change this conclusion. Indeed, the same was true in *Lebron*, where the President was required to make most of his appointments from lists submitted by various groups. *See* 513 U.S. at 385.

reasons, here, unlike in *Keller*, there is little doubt that the government is "accountable to the electorate and the political process for its advocacy." *Southworth*, 529 U.S. at 235. As with all other government speech, those who disagree with the message can blame Congress.

B. Day-to-day oversight of a commodity program by another government agency is not required for the government-speech doctrine to apply. The lower courts have disagreed about whether the Secretary of Agriculture performs any meaningful oversight of the Beef Program and have given this question significant weight in their determinations whether the Beef Program constitutes government speech. *Compare Livestock Mktg. Ass'n* v. *USDA*, 207 F. Supp. 2d 992, 1005-1006 (D.S.D. 2002), *with Charter* v. *USDA*, 230 F. Supp. 2d 1121, 1137-1138 (D. Mont. 2002). That inquiry, however, is wholly beside the point.

If an entity like the Beef Board is itself a governmental entity that is required to deliver a government-defined message, then its speech is necessarily government speech, and oversight by a different government agency is irrelevant. This Court did not ask in *Lebron*, for example, whether the government-appointed directors were subject to day-to-day oversight by some other government official.[6] Any other approach would force courts to make difficult, arbitrary determinations regarding precisely how much government oversight is sufficient for a particular program. For example, is attendance by a government representative at most but not all board meetings sufficient? If the government representative attends but plays no active role, is the defense still viable? This Court should avoid opening the door for further litigation wrestling with minutiae of this nature by holding that the advertising conducted by commodity promotion boards pursuant to a specific mandate by Con-

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[6] To the contrary, the Court recognized that "the directors of Amtrak, unlike commissioners of independent regulatory agencies, are not, by the explicit terms of the statute, removeable by the President for cause, and are not impeachable by Congress." *Lebron*, 513 U.S. at 398.

gress or a State is government speech that does not implicate producers' First Amendment rights.

II. A MANDATORY COMMODITY PROMOTION PROGRAM IS CONSTITUTIONAL IF IT SATISFIES INTERMEDIATE SCRUTINY.

A. It is long settled that a law is not unconstitutional merely because it implicates First Amendment rights. *See, e.g., United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). Rather, before a court may declare a law unconstitutional, it must consider whether the law serves a sufficiently important governmental interest and does so with sufficient precision. Even content-based restrictions on core political speech and prior restraints on speech can survive constitutional scrutiny in some circumstances. *See Burson* v. *Freeman*, 504 U.S. 191, 211 (1992); *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931). Thus, even if a particular commodity promotion program implicates the First Amendment—because it does not involve government speech and is not mere "economic regulation" under the Court's decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 474-475 (1997)—the program must be upheld if it survives the applicable constitutional scrutiny.

Rather than apply this well-established framework to the Beef Program, the Court of Appeals held that it was not required "to engage in such a line-drawing exercise" because this Court had already decided in *United Foods* that any mandatory commodity promotion program that is not part of a broader regulatory scheme is *per se* unconstitutional. *See* Pet. App. 26a. *United Foods*, of course, holds no such thing. To the contrary, the Court was unmistakably clear in stating "we . . . do not consider whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test." 533 U.S. at 410. The notion that the Court nonetheless went on to decide this issue, not only with respect to the mushroom program, but also with respect to every other commodity promotion program—and did so in the context of reviewing whether the district court had

properly granted summary judgment in the Government's *favor*—is unfounded.

B. A law requiring producers of a commodity to fund generic advertising for that commodity is subject to, at most, intermediate scrutiny because such a law only minimally impinges on the First Amendment rights of producers—if it does so at all. Six members of this Court have already indicated that a mandatory commodity promotion program is constitutional if it passes the intermediate scrutiny test established under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). In *Wileman*, Justice Souter, Chief Justice Rehnquist, and Justice Scalia said (in dissent) that they would have applied intermediate scrutiny to commodity promotion programs. *See* 521 U.S. at 492-493 (Souter, J., dissenting). And in *United Foods*, Justices Breyer, O'Connor, and Ginsburg indicated that if the mushroom program were subject to First Amendment scrutiny at all, they would apply only intermediate scrutiny and uphold the program. *See* 533 U.S. at 429 (Breyer, J., dissenting).

To be sure, in neither *Wileman* nor *United Foods* did a majority apply intermediate scrutiny, but in neither case was it necessary for the Court to do so. In *Wileman*, the Court held that the tree-fruit marketing program did not even implicate the First Amendment. The Court questioned in a footnote why the Court of Appeals in that case had started its analysis with *Central Hudson* rather than "apply *Abood*'s 'germaneness' test," *Wileman*, 521 U.S. at 474 n.18, but the Court never stated that a program that passed the higher *Central Hudson* standard would nonetheless be unconstitutional. Similarly, the Court in *United Foods* had no reason to address whether intermediate scrutiny was applicable. *United Foods* principally addressed and rejected the Government's contention that the mushroom program was constitutional as economic regulation under the Court's decision in *Wileman*. *See* 533 U.S. at 411-413. The Court expressly noted that the Government did "not rely upon *Central Hudson* to challenge the Court of Appeals' decision,"

533 U.S. at 410, and the Court therefore never addressed whether a commodity promotion program could be constitutional based on the fact that it serves important governmental purposes, independent of any connection to a broader regulatory scheme. Neither case, therefore, forecloses the application of intermediate scrutiny. *See Waters* v. *Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion of O'Connor, J.); *Webster* v. *Fall*, 266 U.S. 507, 510 (1925).

In any event, because mandatory commodity promotion programs are particularly unlikely to impose significant burdens on free speech, no standard more demanding than intermediate scrutiny should apply.

First, commodity promotion programs involve the compelled funding of only nonpolitical, nonideological, commercial speech. Whatever the level of scrutiny applicable to a *restriction* on commercial speech that deprives consumers of truthful, nonmisleading information, *see 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 501-504 (1996) (plurality opinion of Stevens, Kennedy, and Ginsburg, JJ.); *id.* at 517 (Scalia, J. concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in judgment), this Court's precedents are clear that a regulation of commercial speech that results in *more*, rather than less, speech implicates First Amendment rights to only a limited degree. As a plurality of the Court noted in *44 Liquormart*, the principal reason commercial speech even warrants First Amendment protection is because *consumers* have an interest in *receiving* product information. *See id.* at 496 (plurality opinion of Stevens, Kennedy, Souter, Ginsburg, JJ.). A law that provides consumers with more information therefore should be analyzed differently than a law that limits the flow of information.

In *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), for example, the Court applied highly deferential review in upholding a requirement that an attorney's advertisement disclose that clients must pay costs in contingent fee cases because it was "reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651.

Although the State's interest in that case focused on preventing consumer deception, *see United Foods*, 533 U.S. at 416, the Court made clear that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, . . . [a person's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." 471 U.S. at 651.

Second, laws that regulate the payment of money, even if used for speech, tread less heavily on free-speech rights than laws that regulate speech directly. The payment of money simply is not the equivalent of speech. As the Court recently explained in upholding a ban on corporate campaign contributions, "restrictions on political contributions have been treated as merely marginal speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression." *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003) (internal quotation omitted). For this reason, the Court has held that campaign contribution limits are not subject to the "strong presumption against constitutionality of the sort often thought to accompany the words 'strict scrutiny.'" *McConnell* v. *FEC*, 124 S. Ct. 619, 656 (2003).

By the same token, laws that compel (rather than limit) the funding of speech implicate First Amendment rights to a lesser degree than laws that actually compel speech itself. Indeed, this Court's cases make clear that laws compelling funding of speech do not trigger exacting scrutiny. In *Abood*, for example, before even reaching the germaneness inquiry, the Court invoked a relaxed form of scrutiny—citing "the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress"—in reaffirming that an employee may be compelled to pay fees to a union even if the employee has ideological objections to the union's collective bargaining ac-

tivities. 431 U.S. at 222;[7] *see also Lathrop* v. *Donohue*, 367 U.S. 820, 843 (1961) (Wisconsin "might reasonably believe" that compelled payment of bar dues by all lawyers in the State served "legitimate interests in raising the quality of professional services"). If an employee can be compelled to pay for ideological speech relating to collective bargaining in order serve the important governmental interest in labor policy, then surely a farmer can be compelled to pay for commercial speech in order to serve the equally important governmental interest in agricultural policy.

C. The Court of Appeals erred in concluding that *United Foods* prevented it from undertaking an independent determination whether the Beef Act can be sustained under intermediate scrutiny. Because the Eighth Circuit has not considered the application of intermediate scrutiny, this Court, rather than address the issue in the first instance, should reverse the decision of the Court of Appeals and remand the case for application of that test. *See Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 237 (1995) (remanding for application of the proper level of scrutiny).

III. MOST MANDATORY COMMODITY PROMOTION PROGRAMS WILL SURVIVE INTERMEDIATE SCRUTINY.

Under intermediate scrutiny, a law will be upheld against constitutional challenge if "it furthers an important or substantial governmental interest," "the governmental interest is unrelated to the suppression of free expression," and if the restriction "is no greater than is essential to the furtherance of that interest." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 662 (1994) (internal quotation omitted).

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[7] The "germaneness" inquiry of *Abood* and its progeny is used to determine whether activities outside of core collective bargaining activities may be funded with mandatory dues. *See, e.g., Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991). The separate determination, initially undertaken by the Court in *Railway Employees' Department* v. *Hanson*, 351 U.S. 225 (1956), and acknowledged in *Abood*, that compelled funding of collective bargaining is constitutionally justified, entailed an application of a relaxed form of intermediate scrutiny. *See Abood*, 431 U.S. at 222.

"To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Id.*; *see also Board of Trs. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989).

Whether a particular commodity promotion program survives First Amendment scrutiny is a fact-intensive inquiry that must be made on a case-by-case basis. *See Turner Broad.*, 512 U.S. at 664-665. But most, if not all, mandatory commodity promotion programs—even if they involve only or primarily generic advertising—should pass this test. Such programs further an important governmental interest in helping to sustain important agricultural industries and overcoming the structural impediments that prevent farmers from engaging in significant demand-expanding activity—either individually or through voluntary collective action. Indeed, in *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), the Court of Appeals for the Third Circuit concluded that the Beef Program survived even strict scrutiny precisely because supporting the beef industry is a compelling governmental purpose, the Program is ideologically neutral, and the mandatory nature of the Program is necessary to combat the free-rider problem. *See id.* at 1133-1137.

More recently, in a thorough and well-reasoned opinion, the California Supreme Court held that, under the State Constitution (which is generally more protective of free-speech rights than the United States Constitution), commodity promotion programs are subject to only intermediate scrutiny. *See Gerawan Farming, Inc.* v. *Kawamura*, 90 P.3d 1179, 1192 (Cal. 2004). In considering the application of intermediate scrutiny, the court (1) held that "the objective of maintaining and expanding markets for agricultural products, thereby ensuring the viability of California agriculture, is a substantial objective," *id.* at 1193; (2) rejected the argument that "the government's interest is not substantial simply because the [California Marketing Act] has delegated the decision whether to create a marketing program in a given sector of the agricultural economy to the agricultural producers themselves," *id.*; (3) accepted the State's position that

if the generic advertising at issue is "an efficacious means of significantly improving the sale of agricultural products in this state," then the challenged program directly advances the government's interests, *id.*; and (4) rejected the plaintiff's argument that a program funded from producer assessments is always unconstitutional because it could be funded from general tax revenues, *see id.* at 1194. This Court, if it rejects the government-speech defense and addresses the application of intermediate scrutiny, should apply a similar analysis under the federal Constitution.

A. Mandatory Commodity Promotion Programs Further Substantial Governmental Interests in Supporting Agricultural Industries and Remedying Market Failures.

Agriculture is of fundamental importance to the economies of the United States and particular States. In 2002, over two million farms in the United States produced $200 billion worth of goods, and farm-related employment accounted for approximately 26 million jobs—over 15% of the total jobs in the United States.[8] For California, which has the largest agricultural production of any State in the Nation, the total amount of sales of agricultural products was well over $25 billion in 2002, there were almost 100 million acres of farmland that year, and in 2000, farm-related employment accounted for 15.1% of the State's over 19 million jobs.[9]

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[8] *See 2002 Census of Agriculture*, vol. 1, ch. 1, tbl. 1, *available at* http://ww.nass.usda.gov/census/census02/volume1/us/st99_1_002_002.pdf (last visited Aug. 20, 2004); Economic Research Service, USDA, State Fact Sheets, *available at* http://www.ers.usda.gov/StateFacts/US.HTM (last visited Aug. 20, 2004).

[9] *See 2002 Census of Agriculture*, vol. 1, ch. 2, tbl. 2, *available at* http://www.nass.usda.gov/census/census02/volume1/us/st99_2_002_002.pdf (last visited Aug. 20, 2004); Economic Research Service, USDA, State Fact Sheets, *available at* http://www.ers.usda.gov/StateFacts/CA.htm (last visited Aug. 20, 2004) (jobs total for 2001).

It is clear that given the importance of agriculture to the economy of the United States and various individual States, the governmental interest in supporting the agricultural industry is substantial. The California Supreme Court so concluded in *Gerawan Farming*, *see* 90 P.3d at 1193, and even the Justices in dissent in *Wileman* agreed that maintaining and expanding markets for covered commodities are "substantial government interests," 521 U.S. at 492 (Souter, J., dissenting). Mandatory commodity promotion programs directly advance this governmental interest in two ways: (1) increasing demand for agricultural commodities, and (2) addressing market failures that result in suboptimal spending on agricultural research and promotion.

1. Commodity Promotion Programs Maintain and Expand Agricultural Industries.

Maintaining a vibrant and stable agricultural industry is of utmost importance both to the United States and to individual States. That task, however, is not an easy one. Weather, disease, and pests—uncontrollable and unpredictable—can drastically affect crop output. Moreover, agricultural markets respond poorly to gluts in the market that depress prices. *See* Jon Lauck, *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom To Farm,"* 5 Drake J. Agric. L. 3, 5 (2000). "Instead of adjusting supply when prices sink to unsustainable levels, farmers often maintain production levels—believing that they need to operate at full-capacity in order to make up for lower prices—or increase their production." *Id.* Indeed, many farmers have turned to new technologies to increase production in an attempt to make up for lower prices. But this effort has been likened to running on a treadmill: "[G]reater production through more technology . . . compound[s] the low price problem, creating the need for even more productivity improvements." *Id.* at 5-6. Furthermore, the sheer number of farmers, their small relative size, and the perishability of

crops weaken farmers' bargaining positions.[10] The bargaining power disparity between farmers and large-scale food processors is especially pronounced. *See id.* at 8. Together, the various economic problems that plague agricultural markets and make farming a highly volatile enterprise have been called "the farm problem."[11]

Since the 1930s, the federal and state governments have responded to these market problems in a number of ways. One early legislative response was the Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933), which "created the authority for the regulation of production." Lauck, *supra*, at 12. The flaws of production controls, however, were immediately seen when "[s]ix million little pigs and two-hundred thousand sows were killed to boost hog prices, leaving the country horrified by the mass matricide and infanticide." *Id.* (internal quotation omitted). An alternative to production controls are government price support mechanisms such as nonrecourse loans and subsidies. *See id.* at 13-19. But of course, "direct government payments to farmers . . . cost the federal government more money" than other forms of regulation. *Id.* at 17. Indeed, between 1978 and 2002, the federal government spent in excess of $300 billion—or about 10% of the national debt in 2002—on farm subsidies.[12]

A complement (and, at times, an alternative) to government regulation of supply and government subsidization has been legislation that allows producers of a commodity to band together and fund generic advertising to stimulate *demand*. *See, e.g.*, Federal Agriculture Improvement and Re-

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[10] Olan D. Forker & Ronald W. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs* 7 (1993).

[11] *See* John M. Crespi, *Promotion Checkoffs, Why So Controversial? The Evolution of Generic Advertising Battles*, National Inst. for Commodity Promotion Research & Evaluation 3 (2001), *available at* http://www.aem.cornell.edu/special_programs/commodity/nicpre/bulletins/rb0104.pdf (last visited Aug. 20, 2004).

[12] Robert J. Samuelson, *A Sad Primer in Hypocrisy*, Newsweek, Feb. 11, 2002, at 49.

form Act of 1996 ("FAIR Act"), Pub. L. No. 104-127, § 501(b)(1), 110 Stat. 888 (1996). The Beef Program, for example, is expressly "designed . . . to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. § 2901(b). Similarly, California's commodity research and promotion programs are intended to "increase overall demand for [the] commodities" covered and to "avoid economic waste and maintain stable agricultural markets." Cal. Food & Agric. Code §§ 63901(e), 63901.4.

Such programs play a substantial role in today's agricultural economy. A survey conducted in the late 1990s revealed that there were at least 102 commodity programs in operation with combined budgets of nearly $700 million.[13] At present, there are 17 national federal programs that cover blueberries, beef, cotton, dairy, eggs, milk, Hass avocados, honey, lamb, mangoes, mushrooms, peanuts, popcorn, pork, potatoes, soybeans, and watermelons.[14] For California alone, there are 48 mandatory commodity programs established under state law, including programs for California's top five agricultural products (dairy products, greenhouse/nursery products, grapes, lettuce, and cattle/calves), and 12 federal

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[13] *See* Phillip R. Vande Kamp & Harry M. Kaiser, *Commodity Promotion Programs in the United States* 2, 8 (1999), *available at* http://www.aem.cornell.edu/special_programs/commodity/nicpre/bulletins/rb0104.pdf (last visited Aug. 20, 2004); *see also* Forker & Ward, *supra*, at 101.

[14] *See* USDA, Agricultural Mktg. Programs, *available at* http://www.ams.usda.gov/repromo.htm (last visited Aug. 20, 2004).

marketing orders.[15] The total budget for all of the California commodity programs in 1992 was $112.94 million.[16]

Numerous econometric studies confirm that these programs are highly effective in increasing demand and thus yield a positive return to the producers who fund them. Independent third-party evaluations of several federal commodity promotion programs (required by § 501(c) of the FAIR Act) show that the Dairy, Beef, Soybeans, Pork, Raisins, Eggs, Walnuts, Florida Tomatoes, and Papaya programs have all generated average returns of 4:1 or better.[17]

Apart from these federally mandated studies, numerous other evaluations have concluded that commodity research and promotion programs yield substantial positive returns to producers.[18] Of particular relevance here, the expert re-

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[15] *See* Economic Research Service, USDA, State Fact Sheets, *available at* http://www.ers.usda.gov/StateFacts/CA.htm (last visited Aug. 20, 2004); California Dep't of Food and Agric., List of Marketing Programs, *available at* http://www.cdfa.ca.gov/mkt/mkt/mktbrds.html (last visited Aug. 20, 2004) (two voluntary marketing "agreements" are excluded from the total of 48); USDA, Agricultural Mktg. Servs., List of Fed. Mktg. Orders, *available at* http://www.ams.usda.gov/fv/moabmotab.htm (last visited Aug. 20, 2004).

[16] *See* Hyunok Lee et al., *Mandated Marketing Programs for California Commodities* 25 (Berkeley: Univ. of Cal. Agric. Experiment Station, Giannini Found. Info. Series No. 96-1, Aug. 1996).

[17] Henry W. Kinnucan, *A Critique of the Promotion Evaluations Submitted in Fulfillment of the 1996 FAIR Act* 24 (table 1) (draft paper presented at the NEC-63 meetings held in Baltimore, Md. on Mar. 26, 2004) (Dairy (4.3:1), Beef (5.7:1), Soybeans (9.3:1), Pork (26.2:1), Raisins (7.3:1), Eggs (6.6:1), Walnuts (4.0:1), Florida Tomatoes (27.2:1-30.9:1), and Papaya (10.1:1-31.2:1)).

[18] *See, e.g.*, Hoy F. Carman & R. Kim Craft, *An Economic Evaluation of California Avocado Industry Marketing Programs 1961-1995*, at 46 (Giannini Found. Research Report No. 345, July 1998) (average benefit/cost ratio of 1.89); Julian M. Alston et al., *The California Prune Board's Promotion Program: An Evaluation* 48 (Giannini Found. Research Report No. 344, Mar. 1998) (From 1992 to 1996, "investments by prune growers in promotion through the [California Prune Board] yielded them marginal returns of at least $2.65 for every dollar spent."); Julian M. Alston et al., *The California Table Grape Commission's Promotion Pro-*

port of Professor Ronald Ward, which was entered into evidence, indicates that the Beef Program has increased demand for beef and generated a positive rate of return for beef producers who fund the program through assessments. *See* J.A. 170-173. Professor Ward concluded that on average, "for each dollar spent on the checkoff assessments," producers realized "an additional [$]5.67 net gain." J.A. 172.

2. Commodity Promotion Programs Correct the Market Failure Caused by "Free Riding."

Mandatory programs also advance the governmental interest in a strong agricultural economy by correcting a market failure—caused by the collective action problem—that, with rare exceptions, prevents producers, acting on their own, from spending funds to expand overall demand for their products. The collective action problem that hampers voluntary efforts by farmers to promote their homogenous agricultural products is similar to that accepted by this Court in other contexts to justify compelled funding of speech or association. *See, e.g., Lehnert*, 500 U.S. at 517 ("[T]he considerations that justify the union shop in the private context—the desirability of labor peace and eliminating 'free riders'—are equally important in the public-sector workplace."); *Keller*, 496 U.S. at 12 ("It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort."). The federal and state commodity promotion programs that are intended to address the collective action problem in agriculture deserve similar deference.

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gram: An Evaluation (Giannini Found. Research Report No. 43, Nov. 1997) (finding substantial returns to table grape advertising and promotion over the period 1968-1993), *available at* http://giannini.ucop.edu/Monographs/43-grapes.pdf (last visited Aug. 20, 2004).

The market failure addressed by mandatory commodity research and promotion programs is well documented. Attempts to increase demand for agricultural products through promotion are plagued by "free riding": individuals are unlikely to contribute voluntarily to the provision of a good or service that they share collectively with others if they can "free ride" on the contributions of others with impunity. *See* Forker & Ward, *supra*, at 10 (a "free rider" is an "individual who shares in the benefits but is not willing to pay the appropriate share of the costs"). Advertising for homogenous agricultural commodities is such a good, and, thus, farmers of most commodities (like avocados, cherries, and grapes) are unlikely to engage in voluntary consumer advertising—either individually or collectively.

Most farm commodities, which are often distinguishable only by their packaging (if any), exhibit some characteristics of "cooperative goods." Forker & Ward, *supra*, at 21. Cooperative goods are "[p]roducts that cannot be differentiated" and for which advertising (brand or generic) "may increase total demand, but . . . cannot change market shares among product suppliers." *Id.* For such goods, the free-rider problem prevents the optimal level of promotion from being undertaken: "There would be little incentive for one brand advertiser to promote his goods, since all other suppliers would benefit without paying their share of the advertising cost." *Id.*

The problem of free riding is exacerbated when there are numerous actors involved, none of which maintains a dominant market position. As the number of participants in a collective endeavor grows, each participant receives an increasingly smaller fraction of the total benefits from every dollar it individually contributes to the provision of the collective good, making the incentive to shirk and free ride on the contributions of others increasingly strong. *See generally* Mancur Olson, *The Logic of Collective Action* 33-36, 43-48 (1971). At the same time, both the costs of making private contractual arrangements and the costs of identifying and punishing free-riders (say, by ostracism) increase.

Most agricultural industries are highly fragmented: "[A]griculture is made up of a large number of widely dispersed, atomistic producers[.]"[19] In 2002, each of the over two million farms in the United States had, on average, sales of less than $100,000, and in California there were 79,631 farms, with average total sales of just $323,205.[20] For example, there are 6,000 avocado growers just in California.[21] In contrast, 75% of the U.S. soft drink market is concentrated in two companies (Coca-Cola and PepsiCo), each of which had annual revenues in 2003 of at least $20 billion; 75% of the U.S. peanut butter market is controlled by three companies (J.M. Smucker (Jif), Unilever (Skippy), and ConAgra Foods (Peter Pan)), each of which had annual revenues in 2003 of at least $1.3 billion; and 56% of the U.S. breakfast cereal market is concentrated in three companies (Kellogg, Kraft Foods, and Quaker Oats), each of which had annual revenues in 2003 of at least $8 billion.[22]

For these reasons, individual brand advertising is unlikely to occur for many agricultural products. The average small farmer—unlike Coke, Jif, and Kellogg—cannot afford to run branded consumer advertising, and, even if he or

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[19] J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 Mercer L. Rev. 763, 767 (1993).

[20] *See* 2002 Census of Agriculture, vol. 1, ch. 1, tbl. 1, http://www.nass.usda.gov/census/census02/volume1/us/st99_1_002_002.pdf (last visited Aug. 20, 2004); *id.*, vol. 1, ch. 2, tbl. 2, *available at* http://www.nass.usda.gov/census/census02/volume1/us/st99_2_002_002.pdf (last visited Aug. 20, 2004).

[21] *See* The Laureates of the Univ. of Cal., Riverside, *California Avocado Commission*, *available at* http://www.development.ucr.edu/perpetual/perplaureatescac.html (last visited Aug. 20, 2004).

[22] *See Market Share Reporter* 273, 395 (Robert S. Lazich ed. 2003); C. McGlone et al., *Smucker (J.M.) Co., The - Initiating Coverage*, Deutsche Bank Securities Inc. (Mar. 2003); Hoover's, Company Records for Coca-Cola Co., PepsiCo, Inc., Kellogg Co., Kraft Foods Inc., Quaker Oats Co., The J.M. Smucker Co., Unilever PLC, and ConAgra Foods, Inc., 2003 Annual Sales. (Quaker Oats was acquired by PepsiCo, Inc. in 2001.)

she could, it would not be economically rational to do so.[23] One commentator has described the small farmer's plight as follows:

> For farmers growing homogenous products, in the absence of a significant market presence, there is no incentive for . . . an individual producer . . . to engage in advertising because other producers of the same commodity may free ride upon this advertising. An individual producer[] [can] either advertise in the hopes of establishing a distinguishable brand or refrain from advertising altogether. More often than not, because agricultural commodities are indistinguishable, the latter decision is made. Thus, a suboptimal level of advertising is expended in the industry[.]

Crespi, *supra*, at 11-12. Indeed, the expert report submitted in this case explains that individual agricultural commodity advertising is often impossible: "Given both the high entry cost for developing a meaningful promotion program and the free rider issue, for many industries the only option is to fund an industry wide effort . . . ." J.A. 168.

The free-rider problem is also likely to undermine any voluntary efforts by producers collectively to generate generic advertising because "[g]eneric advertising of a homogenous commodity is a type of public good." Henry W. Kinnucan & Øystein Myrland, *Free-Rider Effects of Generic Advertising: The Case of Salmon*, 19 Agribusiness 315, 315

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[23] Thus, it is no surprise that with respect to many commodities, consumers do not recognize brands and do not make purchase decisions based on brand. A survey of 808 primary grocery shoppers revealed that when purchasing fresh grapes, the following factors, rather than brand, are the most important: ripeness/freshness, whether the grapes are seedless, taste, price, color, size, appearance, and whether the grapes were in season, organic, domestically grown, and conveniently packaged. *See* California Table Grape Comm'n, Brand Survey, *available at* http://www.freshcaliforniagrapes.com/consumer_research.pdf (last visited Aug. 20, 2004). By contrast, 40% of peanut butter shoppers said brand was the most important factor to them. *See id.*

(2003). The "benefits of any price rise caused by the advertising are shared by all of the commodity's producers regardless of whether they paid into the program." *Id.* And this "ability to 'free ride' weakens the producer's incentives to contribute to the program." *Id.* "Hence, in the parlance of public good theory . . . 'collective' goods like generic advertising tend to be under-provided relative to the social optimum." *Id.*; *see also* J.A. 168 (without mandatory commodity promotion programs, "it is impractical if not impossible for producers within some industries to address the informational needs for the good of the total industry").

Empirical evidence confirms what theory predicts. Economic analysis of individual firm advertising patterns, for example, reveals that firms generally commit the most resources to consumer advertising where there is strong product differentiation (such as is created by meaningful brands) and a highly concentrated industry structure (*i.e.*, where there are few sellers).[24] Furthermore, the actual history of some voluntary commodity promotion programs supports the theory. For example, the experience of the American Egg Board shows how a voluntary promotion program can unravel due to the free-rider problem. In the first years of the Egg Board's voluntary program, very few producers requested refunds. But by 1988, almost half of the assessments were being refunded. *See* Forker & Ward, *supra*, at 126. The same phenomena occurred in the cotton research and promotion program, which before 1990 allowed producers to request a refund of their assessments. Over time the percentage of producers requesting refunds increased steadily, severely undermining the program's efficacy and fairness. *See id.* at 122 (noting that 35% of producers were requesting refunds by 1990).

In short, absent the use of mandatory programs, only commodities with concentrated market structures will

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[24] *See* Michael S. Willis & Richard T. Rogers, *Market Share Dispersion Among Leading Firms as a Determinant of Advertising Intensity*, 13 Rev. of Indus. Org. 503-506 (1998).

achieve even close to optimal levels of product promotion. In markets where small farmers predominate, commodity advertising will be nonexistent. And in addition to generating a suboptimal amount of commodity promotion—and thus favoring industries with greater market concentration—the free-rider problem also allows some producers unfairly to benefit from the consumer advertising, if any, that is actually produced.

Legislation requiring producers of a commodity to band together and to fund promotion collectively is a straightforward response to the collective action problem. *See* Forker & Ward, *supra*, at 10 (the mandatory commodity promotion programs that replaced earlier voluntary programs "are a direct outgrowth of the potential free-rider problem."); *Commodity Advertising and Promotion* xiv (Henry W. Kinnucan et al. eds., 1992) (forward by Alan D. Forker) ("[I]nherent in the voluntary arrangement is the 'free rider' problem. In addition to the inequity involved, the 'free rider' issue made it difficult to collect enough money to develop effective programs."). Indeed, Congress and the States have recognized the free-rider problem when enacting commodity promotion programs. *See* FAIR Act § 501(b)(7) (such programs employ "promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ."); Cal. Food & Agric. Code § 63901(c) (commodity promotion programs needed for agricultural industries, "which tend to be decentralized with many small entities operating in diverse locations."). Moreover, Congress recognized that it is small producers in particular who need to be able to come together to promote their products collectively. *See* FAIR Act § 501(b)(10) ("[G]eneric commodity promotion programs are of particular benefit to small producers who often lack the resources or market power to advertise on their own and who are otherwise often unable to benefit from the economies of scale available in promotion and advertising.").

B. Mandatory Commodity Promotion Programs Directly Advance an Important Governmental Purpose and Are Narrowly Tailored.

1. As the dissenting opinion in *Wileman* suggests, the question whether a particular program directly advances the important governmental purposes of "stabiliz[ing] markets for covered agricultural products and maintain[ing] the prices received by farmers" necessarily requires case-by-case analysis. 521 U.S. at 492 (Souter, J., dissenting). The vast majority of commodity research and promotion programs, and the Beef Program in particular, however, should satisfy this test.

The dissenting Justices in *Wileman*, for example, noted that the Government offered nothing more than "speculation" in support of its contention that the treefruit program "appreciably increase[d] the total amount of advertising for" mushrooms. *Id.* at 501. Here, in contrast, the record amply demonstrates that the Beef Program has substantially increased demand (and thus price) and that, without the program, neither individual cattlemen nor voluntary associations would have the incentive or ability to engage in similar demand-expanding activity. *See* J.A. 168-173. Moreover, there is no reason to believe that the program creates any disincentives for cattlemen to engage in voluntary advertising—if they were otherwise so inclined or able—particularly since they actually have more, rather than less, revenue to spend given the program's success.

Similarly, even under the reasoning of the dissenting Justices in *Wileman*—who questioned whether the Agricultural Marketing Agreement Act of 1937 ("AMAA") was implemented in a manner consistent with the "the Act's stated purposes," *see* 521 U.S. at 494, 495-499 (Souter, J., dissenting)—the Beef Act and the vast majority of other programs raise no concerns.[25] The purpose of the Beef Act, for exam-

[25] Whether the adoption of any given federal marketing order is rational, moreover, is a fact-specific question that should be analyzed on a case-by-case basis.

ple, is "to maintain and expand domestic and foreign markets and uses for beef and beef products," 7 U.S.C. § 2901(b), and it directly advances this purpose by targeting a single commodity for promotion throughout the United States. *See* 521 U.S. at 493 ("[I]f the Government were to attack these problems across an interstate market for a given agricultural commodity or group of them, the substantiality of the national interest would not be open to apparent question."). Similarly, California's overall approach to commodity research and promotion, far from being arbitrary, is best described as comprehensive. Forty-eight commodities are covered, including the State's top five, and the coverage spans producers statewide.

2. The Beef Act and the vast majority of similar research and promotion programs are, likewise, narrowly tailored. Under intermediate scrutiny, the "fit" between the legislative purpose and the means used to achieve that end need not constitute "the single best disposition but one whose scope is in proportion to the interest served." *Fox*, 492 U.S. at 480 (internal quotation omitted). Moreover, it is well settled that the government may "attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied." *Zauderer*, 471 U.S. at 651 n.14.

By their nature, most commodity research and promotion programs are quite narrowly tailored: (1) they do not limit in any way a farmer's ability to speak on any subject he or she may choose to address; (2) they do not require any producer "to engage in any actual or symbolic speech"; and (3) they "do not compel the producers to endorse or to finance any political or ideological views." *Wileman*, 521 U.S. at 469-470. Moreover, non-mandatory efforts at joint advertising have not succeeded. *See supra* pp. 21-22.

Some have argued that a law authorizing the mandatory collection of assessments from producers of a commodity to be used for promotion is not narrowly tailored because there exists the supposedly less restrictive alternative of funding a promotion program with "general [tax] revenue." *Gerawan*

Farming, 90 P.3d at 1194; *Pelts & Skins, LLC* v. *Landreneau*, 365 F.3d 423, 434 n. 21 (5th Cir. 2004). That argument, however, misunderstands the purpose of the laws at issue. As discussed in more detail above, laws allowing producers of a commodity to put in place a mandatory commodity promotion program are a direct response to the collective action problem that prevents those producers from banding together voluntarily to produce the optimal amount of advertising for that commodity. The remedy for a market failure that prevents a group from acting together to produce a good for its collective benefit is not to make someone else pay for the good. Just as the problem of collective action in the labor context is not more narrowly redressed by requiring that all taxpayers fund a union's collective bargaining activities, Congress was entitled to make the judgment that only those who most directly benefit from the demand-expanding activity of the Beef Program should be required to fund that effort.

Finally, unlike the AMAA, neither the Beef Act nor the vast majority of similar laws takes an inconsistent stance with respect to credits for individual brand advertising. *Cf. Wileman*, 521 U.S. at 502-503 (Souter, J., dissenting). A credit program, moreover, is unfair to smaller producers, who cannot afford to purchase their own advertising; risks promoting one or two powerful brands instead of the overall industry; and ignores the fact that effective consumer advertising is very expensive and thus effective only when resources are combined.

IV. Commodity Programs That Require Producers to Associate For Important Reasons Apart from Conducting Generic Advertising Satisfy the "Germaneness" Test of *Abood*.

As discussed above, a mandatory commodity program that does nothing more than undertake generic advertising can be sustained under the government-speech doctrine or under intermediate scrutiny. But as the Court explained in *Wileman* and *United Foods*, a law requiring that producers jointly fund various commercial activities—just one of which

is generic advertising—designed to strengthen the economic position of their industry, is also constitutional under the "germaneness" test of *Abood* and *Keller*.[26]

A. In *Abood*, the Court applied a relaxed form of scrutiny and held that nonunion employees could be compelled to fund, over their ideological objections, activities that were "germane" to the union's collective bargaining function. 431 U.S. at 235; *see also Keller*, 496 U.S. at 13-14 ("The State Bar may therefore constitutionally fund activities germane to" the goals of "regulating the legal profession and improving the quality of legal services" with "the mandatory dues of all members."). Compelling employees to associate for purposes of collective bargaining was justified to "distribute fairly the cost of these activities among those who benefit [and] counteract[] the incentive that employees might otherwise have to become 'free riders' [who] refuse to contribute to the union while obtaining the benefits." *Abood*, 431 U.S. at 222; *see also Keller*, 496 U.S. at 12.

The Court applied this germaneness test in both *Wileman* and *United Foods*. In *Wileman*, the Court held that to the extent the tree-fruit marketing program at issue implicated the First Amendment, it was constitutional under *Abood* because the generic advertising was "unquestionably germane to the purposes of the marketing orders." *Wileman*, 521 U.S. at 473. In *United Foods*, the Court declined to follow *Wileman* because "almost all" of the mandatory assessments for the mushroom promotion at issue there were used for generic advertising and thus the only program the compelled assessments served was "the very advertising scheme in question." 533 U.S. at 412, 415.

In combination, *United Foods* and *Wileman* make clear that compelled funding of generic advertising undertaken by

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[26] Whether the Beef Act is constitutional under this standard is reasonably encompassed within the questions presented. If the Court does not reach this issue, however, it should make clear that it is not implicitly foreclosing this independent and previously established defense.

a commodity research and promotion program is constitutional under *Abood* if the advertising is "germane to a purpose related to an association independent from the speech itself." *United Foods*, 533 U.S. at 415. Where a program requires producers to associate in order cooperatively to market their product, as in *Wileman*, this requirement is met. *See id.* The same is also true where a law requires producers of a commodity to associate for other economic purposes, such as undertaking research and development that will benefit the entire industry or working to open or expand export markets for a commodity. Such purposes, which further the overarching goal of improving the economic position of an agricultural industry, are related to economics, not speech.

Moreover, as in the union context, there is a need to mandate collective action to pursue these activities. The free-rider problem that affects small producers of commodities in fragmented industries (discussed above) prevents those producers from banding together voluntarily to engage in the optimal amount of research and development and efforts to expand export markets. For a group of producers, research and promotion and market access activities, like generic promotion, are "public goods." If a new seedless variety of grape is developed, a method for dealing with pests is improved, a compound in grapes that prevents heart disease better understood, or an export market for grapes opened, then all grape producers benefit. Such "goods" are often too expensive for one producer to pursue and often difficult, if not impossible, to pursue through voluntary collectives, which face the threat of free-riding.

In short, mandatory associations for research and development, export market development, and other similar activities are precisely the sorts of economic arrangements governed by *Abood*. Accordingly, to the extent generic advertising is germane to these programs, the entire program is constitutional under *Abood* and its progeny.

B. For many commodity programs, the germaneness test will be readily met. *First*, many commodity programs

require producers to associate for an economic purpose distinct from generic advertising. The Ketchum Act, Cal. Food & Agric. Code §§ 65500 et seq., which establishes the California Table Grape Commission, for example, states that its purpose is not merely to support generic advertising, but to "aid producers of California fresh grapes in preventing economic waste in the marketing of their commodity, to develop more efficient and equitable methods in such marketing, and to aid such producers in restoring and maintaining their purchasing power at a more adequate, equitable, and reasonable level." Cal. Food & Agric. Code § 65500(g). The statute, therefore, gives the Commission the authority, among other things, (1) to "conduct . . . scientific research" regarding "the dietetic value of fresh grapes," "cultural practices and product handling," and "the production, storage, refrigeration, inspection, and transportation of grapes," and (2) "to present facts to and negotiate with state, federal, and foreign agencies on matters which affect the marketing and distribution of fresh grapes." *Id.* § 65572(h), (i), (k).

In practice, moreover, many commodity research and promotion programs engage in significant economic activity distinct from generic advertising. To use the California Table Grape Commission again as an example, it funds research into the phytonutrients in grapes that may prevent or cure disease; viticulture research related to the development of new varieties of grapes, the control of pests, and other issues of concern to growers; and category management research to determine how retailers can most effectively sell grapes to consumers. The Commission also undertakes substantial efforts to open foreign markets to California grapes. It worked, for example, with the United States Department of Agriculture and the United States Trade Representative to open China and Australia to California grapes, and it continues to work to keep those and other markets open.[27] These activities and many others fur-

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[27] *See generally* California Table Grape Commission website, *available at* http://www.freshcaliforniagrapes.com (last visited Aug. 20, 2004).

ther California's goal of "aid[ing] producers of California fresh grapes." Cal. Food & Agric. Code § 65500(g).

Second, the generic advertising undertaken by commodity research and promotion programs of this sort is unquestionably "germane" to the economic purpose of the programs. *See Wileman*, 521 U.S. at 473. The advertising itself increases demand for the commodity. Moreover, the advertising often works in tandem with the program's non-speech, economic activities. For example, the statute governing the California Table Grape Commission authorizes it to "educate and instruct the public with respect to . . . the healthful properties and dietetic value of fresh grapes." Cal. Food & Agric. Code § 65572(i). And in practice, the Commission's advertising campaign, which has described grapes as "The Natural Snack," pursues exactly that goal. Programs like this, that engage in advertising as just one tool among many to increase demand, and that would not receive adequate funding if left to voluntary contributions, satisfy the germaneness test of *Abood*.

C. The Beef Program itself readily meets this test. Its purpose—"to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef," 7 U.S.C. § 2901(b)—is purely economic and unrelated to speech. And the program's advertising is germane to this purpose. The generic beef advertising is just one part of a larger program involving significant research and consumer information activities, including research and education projects addressing foodborne pathogens, the proper handling of beef products, nutrition and health, and cattle diseases, including mad cow disease. *See, e.g.*, Brief for Pet'rs Nebraska Cattlemen 13-16, 49 n.16. Because the Court of Appeals failed even to consider whether the Beef Program could pass muster under *Abood*'s germaneness test, a remand with respect to this issue is appropriate.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
TODD C. ZUBLER
BRIAN M. BOYNTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for the California Agricultural Issues Forum

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